



FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
COMMISSIONER ADAM H. PUTNAM

February 17, 2012

Mr. Vince Singleton
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

SUBJECT: 373.406(2) Binding Determination – St. Johns Improvement District


Dear Mr. Singleton:

Per your request, enclosed please find our written report on the subject referral. In short, it is the Department's opinion that the operation in question is engaged in production agriculture and that the wetland impact is not exempt under subsection 373.406(2), Florida Statutes.

If you or your staff have any questions as you review the document, please feel free to contact me or Bill Bartnick at 850-617-1700.

Sincerely,

ADAM H. PUTNAM
COMMISSIONER


Richard J. Budell
Director

Enclosure

cc: Bob Ulevich
Carol Forthman

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
1203 Governors Square Blvd., Suite 200
Tallahassee, Florida 32301

Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
St. Johns Improvement District, Indian River County

FDACS Clerk No. A77645

Introduction:

Pursuant to Section 373.407, F.S., a water management district or landowner may request that the Florida Department of Agriculture and Consumer Services (FDACS) make a binding determination as to whether an existing or proposed agricultural activity qualifies for a permitting exemption under Section 373.406(2), F.S. However, in order for FDACS to conduct a binding determination, all of the following conditions must exist:

- a. There must be a dispute between the landowner and the water management district as to the applicability of the exemption.
- b. The activities in question must be on lands classified as agricultural by the county property appraiser pursuant to Section 193.461, F.S.
- c. The activities in question have not been previously authorized by an environmental resource permit (ERP) or a management and storage of surface water (MSSW) permit issued pursuant to Part IV, Chapter 373, F.S., or by a dredge and fill permit issued pursuant to Chapter 403, F.S.

St. Johns River Water Management District (District) has requested that FDACS conduct a binding determination on St. Johns Improvement District (SJID), and the conditions described above are in place based on guidance received from FDACS legal staff. Per this request, FDACS staff has performed a site inspection and evaluated District-provided documentation, and has rendered a conclusion. The basis for that conclusion is provided below.

Background:

The SJID is located in western Indian River County. It encompasses an area of approximately 43 square miles (29,000 acres) and is located entirely within Indian River County. The SJID is responsible for drainage, flood control and protection, water management, and reclamation of lands within its boundaries. The SJID and its associated works are governed pursuant to Chapters 298 and 189, Florida Statutes.

Of the approximately 29,000 acres represented within the SJID, approximately 25,000 acres is in agricultural use. The agricultural commodities represented herein are citrus, sod farming, and pasture land. The balance of the area is represented by a reservoir/stormwater treatment area; ditches; flow ways; wetlands; irrigation laterals; pump stations; and roadways.

SJID holds a District Consumptive Use Permit (CUP #70, modified and approved on August 9, 2011) that allows for the continued use of surface water from the SJID's main reservoir, flow-way and County-Line reservoir for irrigation of citrus, sod and pasture. The permit also allows for a supplemental irrigation allocation from the C-52 and the Fort Drum Marsh Conservation Area, as well as an allocation for freeze protection. Only individual landowners within the SJID have groundwater wells for obtaining supplemental water for irrigation purposes. Because of increased regulatory pressures to reduce the use of water from the surficial aquifer, the landowners within the SJID have become increasingly reliant on surface water provided by the SJID. The landowners within the SJID use the surface water within the reservoir, flow-way, and County Line reservoir as their primary source of irrigation water.

Historically, SJID received a significant portion of its permitted irrigation volume, in accordance with the approved CUP from the C-52/L-79 canal system. In the fall of 2009, modifications were made to the operation schedule of the Structure S-252-D that essentially eliminated flows from the Fort Drum Marsh Conservation Area via Structure S-252-D into the C-52/L-79 system. This has greatly reduced the irrigation supply available to SJID. In addition, the taking of the SJID North Perimeter Canal (by the FDOT for the widening of SR60) has greatly reduced the storage capacity for storage and distribution of irrigation water.

The SJID applied for a permit to the District on June 12, 2011, for multiple improvements across the SJID. More specifically, the SJID is proposing to modify their existing ERP permit to relocate the southern levee approximately 20 feet to the north of its existing location and to replace existing structures. The levee is approximately 5 miles long and serves as the northern boundary of the C-52 Flow-Way East. The C-52 Flow-Way East currently provides drainage to the north into the upper basin of the St. Johns River. It also serves as an irrigation source for the SJID, when there is sufficient water for the SJID to operate their gates. The proposed structural modification along with the levee relocation will allow the SJID to store an additional 283 million gallons (867 acre-feet) of water. Of this, 53 million gallons (162 acre-feet) will be from the proposed levee relocation project. Overall, this will result in an increased use of surface water for irrigation, and less dependence on stressed aquifer sources.

Based on National Wetland Inventory and Hydric Soil maps, the District has identified jurisdictional wetlands within the footprint of the proposed levee relocation area, and has estimated that the proposed activities will result in adverse impacts to a significant amount of wetland acreage. It should be noted that the exact limits and associated acreage of the wetlands within the footprint of the proposed levee relocation are not known, since a formal wetland delineation has not been made by the permittee or the District to date. It should also be noted that in a District memo dated November 2, 2011, District staff reports that the quality of the wetlands within the levee relocation area is described as varying widely. It describes some areas existing as cypress heads with a predominance of appropriate vegetation, while others exist in a much more disturbed state with a combination of appropriate and inappropriate vegetation.

On November 3, 2011 the FDACS received a request for a binding determination from the District as to whether the proposed relocation of the levee on the C-52 Flow-Way East located in the southern portion of the SJID qualifies for an agricultural exemption pursuant to 373.406(2) F.S.

Site Inspection Findings:

On January 13, 2012 a site inspection was performed by Vanessa Bessey and Jody Lee with the FDACS, accompanied by Tom McGowan, Bob Ulevich, and others representing the SJID. As part of the investigation, digital photos were taken at various locations along the proposed dike relocation area.

The existing levee is part of a permitted surface water management system and the SJID is seeking to modify the exiting permit to relocate the southern levee approximately 20 feet to the north along the northern boundary of the C-52 Flow-Way East. Based on field review of the area, jurisdictional wetlands appear to be present in the proposed relocation area; however, to reiterate, these areas have not been formally delineated to date. Tom McGowan provided a worst-case estimate of the wetland impact area which could be up to 15 acres (based on the proposed levee being five miles long with an average width of 25 feet).

Application of Statutory Criteria:

Pursuant to Section 373.406(2), F.S., all of the following criteria must be met in order for the permitting exemption to apply.

- (a) *"Is the landowner engaged in the occupation of agriculture, silviculture, floriculture, or horticulture?"*

YES. The FDACS finds that the SJID was formed by and is controlled by the owners of the agricultural lands that the SJID serves. Those lands have obtained the agricultural tax classification that is a requirement for the exemption.

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- (b) *"Are the alterations (or proposed alterations) to the topography of the land for purposes consistent with the normal and customary practice of such occupation in the area?"*

NO. Additional storage notwithstanding, the FDACS finds that the proposed levee relocation activities and associated permanent wetland impacts would exceed what are normal and customary practices for wetlands within citrus groves. Most flatwoods groves are permitted by the water management districts and utilize above-ground impoundment (retention/detention) areas that incorporate the isolated onsite wetlands into the design. The proposed alterations to the C-52 Flow Way-East would permanently destroy the wetlands.

(c) *"Are the alterations (or proposed alterations) for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands?"*

YES. The FDACS finds that the proposed alterations are for the sole and predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, the FDACS has determined that the proposed relocation of the southern levee approximately 20 feet to the north of its existing location is not a normal and customary agricultural activity for the area and does not qualify for an exemption under Section 373.406(2), F.S.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

A determination by the Department that an activity is not exempt from permitting does not preclude the landowner and the water management district from agreeing to modifications to the activity that would render it exempt.

Notice of Rights:

If you wish to contest the Department's action, you have the right to request an administrative hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes, and to be represented by counsel or other qualified representative. Mediation is not available. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, and telephone number, and facsimile number of your attorney or qualified representative (if any) upon whom service of pleadings and other papers shall be made.
3. A statement that you are requesting an administrative hearing and dispute the material facts alleged by OAWP, in which case you must identify the material facts that are in dispute (formal hearing); or that you request an administrative hearing and that you do not dispute the facts alleged by the Department (informal hearing).
4. A statement of when (date) you received this Notice and the file number of this Notice.

Your request for a hearing must be received at: The Office of Agricultural Water Policy, 1203 Governors Square Blvd. Suite 200, Tallahassee, Florida 32301, within twenty-one (21) days of receipt of this Notice. If you fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and the binding determination will become final agency action upon filing with the agency clerk.

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedures. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Supporting Documents:

- (1) USDA Soil Survey, Indian River County, Florida
- (2) Site Visit Digital Photographs
- (3) 2011 Memo from Carol Forthman, Senior Attorney, FDACS
- (4) SJRWMD Exemption Determination Submittal received November 3, 2011
- (5) Additional information from SJRWMD received on January 12, 2012
- (6) Indian River Citrus BMP Field Guide, Publication Number FTP2003-4
- (7) Additional information from AECOM received on February 8, 2012

Filed with the Agency Clerk and rendered this 16th day of February, 2012.




Paul Palmiotto, Agency Clerk

Florida Department of Agriculture and Consumer Services
Office of Agricultural Water Policy

TRANSMITTAL MEMORANDUM

**BINDING DETERMINATION REGARDING EXEMPTION
PURSUANT TO SECTION 373.406(2), FLORIDA STATUTES**

		Date of Action	Approval	Initials
TO:	Mike Joyner, Assistant Commissioner*	2-15-12	<input checked="" type="checkbox"/>	
THROUGH:	Lorena Holley, General Counsel	2/14/12	<input checked="" type="checkbox"/>	JAH
THROUGH:	John Costigan, Assistant General Counsel	2/12/12	<input checked="" type="checkbox"/>	JMC
THROUGH:	Carol Forthman, Senior Attorney (OGC Attorney assigned to Division or file)	2/10/12	<input checked="" type="checkbox"/>	CAF
FROM:	Rich Budell, Director Office of Agricultural Water Policy	2/9/2012	<input checked="" type="checkbox"/>	R.B.

SUBJECT: Binding Determination for St. Johns Improvement District

BACKGROUND: This is a 29,000 acre tract in Indian River County, managed by the St. Johns Improvement District. The St. Johns Improvement District is proposing to relocate an existing levee and enlarge a canal flow-way to increase water storage. The proposed design would permanently impact up to 15 acres of wetlands. The activity is determined to be not exempt.

DATE: February 9, 2012

FINAL DATE FOR ISSUANCE: March 1, 2012

* Please return to Office of General Counsel. OGC will obtain the clerk's signature and return the signed order to the Office of Agricultural Water Policy.
